STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Elizbeth L. Gleicher and Anica Letica

DAVID R. SANDERS and HEATHER H. SANDERS,

Plaintiffs-Appellees,

-vs-

TUMBLEWEED SALOON, INC., and PAINTER INVESTMENTS, INC., doing business as CHAUNCEY'S PUB,

Defendants-Appellants,

and

SHAWN SPOHN and ZACHARY PIERCE,

Defendants.

Supreme Court Docket No. 158789

Court of Appeals No. 338937

Montmorency Circuit Court
Lower Court Case No.: 16-003949-NO

DEFENDANT/APPELLANT TUMBLEWEED SALOON, INC.'S REPLY BRIEF

PROOF OF SERVICE

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STATEMENT OF FACTS

The plaintiffs go on at length about the alleged horrible beating that plaintiff David Sanders sustained while in front of the co-defendant Chauncey's Pub. These facts are not relevant to the legal issue presented. In order to avoid factual disagreements, Tumbleweed, in its Application for Leave to Appeal, agreed that the Court could assume the facts as stated in the Court of Appeals' Opinion, although those were the facts giving all benefit of doubt to the plaintiffs.

It should be clear, however, that the facts presented by the plaintiffs are not supported by the record below. It must be kept in mind that the actual wrongdoers in this case were the two alleged assailants, Shawn Spohn and Zachary Pierce, who were involved in the fight with the plaintiff outside of Chauncey's Pub. The two men spent most of the evening at Chauncey's. They then came into the Tumbleweed. They each were served a beer and a shot (see plaintiff's **Exhibit "7"**, deposition transcript of Michael Solonika, p 9-11).

The two men were at the Tumbleweed for less than ten minutes. They each consumed approximately two swallows of their drink. While at the Tumbleweed, the two men did not tell anyone of their prior activities at Chauncey's and they did not show any visible signs of intoxication (see plaintiff's **Exhibit "1"**, deposition transcript of Zachary Pierce, p 38, 40-41, 45, 47-48 and 50-54). After the two men began drinking their drinks, they began to grab each other in a playful manner, while sitting at the bar. Since people were in the bar having dinner, Mr. Solonika, the bartender asked them to stop.

When they started up again, Mr. Solonika took their nearly full drinks. The two men then left the bar and returned to Chauncey's Pub. The Dramshop Act, MCL

436.1801, forbids a bar from serving a patron after that patron displays visible signs of intoxication. In this case, **the Tumbleweed did exactly what it was required to do under the law. The bartender took the two men's drinks and cut them off. That is exactly what they were supposed to do, pursuant to the Dramshop Act.**

As a result, as part of its Motion for Summary Disposition in the Trial Court, one of Tumbleweed's arguments was that it was entitled to Summary Disposition, pursuant to MCR 2.116(C)(10), because the plaintiff had not and could not produce evidence to demonstrate a prima facia dramshop case, that is, that the defendant served the two alleged assailants after they displayed visible signs of intoxication while at the bar. The Trial Court, however, found that since there was such a clear cut violation of the 120 day notice provision under the Dramshop Act, decided not to reach the issue of whether the plaintiff presented evidence to establish a prima facia dramshop case. This Honorable Court should focus on the legal issue involved, since the Trial Court did not reach the issue of whether the plaintiff had demonstrated facts that would establish a violation of the Dramshop Act.

ARGUMENT

I. THROUGHOUT THEIR BRIEF, THE PLAINTIFFS BASICALLY ARGUE ONE ISSUE - - THAT IS, THAT THERE WAS NO "MEETING OF THE MINDS" BETWEEN THE PLAINTIFFS AND THEIR ATTORNEY, MEKLIR. THAT, HOWEVER, IS NOT THE ISSUE. THE ISSUE IS WHETHER THE PLAINTIFF'S ARE BOUND BY THE EXPLICIT REPRESENTATIONS OF THEIR ATTORNEY.

The plaintiffs argument, throughout their Brief, is that they did not authorize Meklir to send the letter. The claim is that, since there was no "meeting of the minds" between the plaintiffs and Meklir, the defendant had no right to rely upon the letter it received from Meklir. Plaintiffs misunderstand the law. What went on between the plaintiffs and Meklir is irrelevant. The relevant issue is what was represented to a reasonable third party.

Accepting the plaintiff's argument, and allowing the Court of Appeals decision to stand, would turn Michigan Law on its head. Attorneys throughout the state of Michigan rely upon statements made by opposing attorneys on a daily basis. If a client was never bound by the representations of his attorney, there would be chaos. Attorneys would be forced to communicate directly with the opposing party, even if an attorney represented in writing that he was representing that party. That, alone, presents ethical questions.

The plaintiff claims that the defendant did not cite law confirming that a party is bound by the statements of his attorney. Defendant cited substantial case law to support that concept, which is virtually universal. The Michigan Court Rules also recognize that. Both the Court Rules and case law demonstrate that a party is bound by the statements of his attorney. MCR 2.507 states, in relevant part:

> (G) Agreements to Be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the

> party against whom the agreement is offered **or by that party's attorney.**

(Emphasis Supplied).

The Court Rule reflects an understanding by this Court that parties are bound by what their attorneys put in writing. The seminal case on this issue is *Nelson v Consumers Power Co*, 198 Mich App 82 (1993). In *Nelson*, the plaintiff's attorney (Bartnick) and the defense attorney agreed to a settlement of $20,000.00. Just like the clear and unequivocal statement made by Meklir in the instant case, the plaintiff's attorney sent a letter to the defendants in which he clearly and unequivocally accepted the settlement offer. Much like the plaintiffs argue in the instant case, the plaintiff in *Nelson* argued that she never authorized her attorney to send the letter, which agreed to the settlement. The issue faced by the *Nelson* Court was whether the statement made by the plaintiff's attorney in the letter was binding on the plaintiff, when the plaintiff alleged that she never gave the attorney authority to settle the case. The issue, therefore, was whether the clear representation made by the plaintiff's attorney in his letter was binding, even if there was no "meeting of the minds" between the plaintiff and her attorney. The Trial Court held that the defendant was entitled to rely upon the attorney's representations. The Trial Court specifically held:

> Although a dispute may exist between plaintiff and her attorney whether she did or did not accept the offer of $25,000.00 [sic] described to her over the phone, defense is correct when it argues it may properly rely upon a communication received from plaintiff's attorney that its settlement offer has been accepted.
>
> ***

> The Court is satisfied that defense justifiably relied upon plaintiff attorney's telephone and written communications that the offer by defense for $20,000.00 was accepted.

Nelson, at 85.

As in the instant case, the plaintiff in *Nelson* argued that there were unresolved factual disputes as to what the plaintiff's attorney was and was not authorized to do. The plaintiffs in the instant case, similarly, argue that because they claim that Meklir did not have authority to represent them, and Meklir specifically stated that he was representing them, that there is a question of fact which precluded summary disposition. The Court of Appeals in *Nelson* found that, whatever the communication was between the plaintiff and her attorney, that was irrelevant, since the attorney made a clear and unequivocal statement in the letter to the defendant. The *Nelson* Court stated:

> This unresolved factual dispute, however, is simply not dispositive of the issue before us. Defendant argues, as it did successfully below, that it was entitled to rely on the apparent authority of Bartnick [plaintiff's attorney] to enter into a binding settlement agreement on behalf of his client. After reviewing the relevant authorities, we are constrained to agree with defendant's argument.

Nelson, at 87.

Similarly, the United States Court of Appeals for the Sixth Circuit in *Capital Dredge & Dock Corp v Detroit*, 800 F 2d 525 (6th Cir, 1986), held that parties are bound by the statements of their attorneys. Both the Sixth Circuit in *Capital Dredge* and the Court of Appeals in *Nelson* recognized the potential problems that would exist if parties were not bound by their statements. The *Nelson* Court, citing to *Capital Dredge*, held as follows:

> "[P]rudent litigants could not rely on opposing counsel's representation of authorization to settle. Fear of a later claim that counsel lacked authority to settle would require litigants to go behind counsel to the opposing party in order to verify

> authorization for every settlement offer." [*Capital Dredge*, at 532. Emphasis in the original]
>
> Suffice it to say, we find the opinion in *Capital Dredge* to be both well-reasoned and highly persuasive. Accordingly, quoting from *Capital Dredge*, *supra* at 530-531, we hold as follows:
>
> Generally, when a client hires an attorney and holds him out as counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter. See *Terrain Enterprises, Inc v Western Casualty & Surety Co*, 774 F 2d 1320 (CA5, 1985); *Bergstrom v Sears, Roebuck & Co*, 532 F Supp 923 (D Minn, 1982); *Walker v Stephens*, 3 Ark App 205; 626 SW 2d 200 (1981); *Hutzler v Hertz Corp*, 39NY 2d, 209; 383 NYS 2d, 266; 344 NE 2d 627 (1976); cf. *Sustrik v Jones & Laughlin Steel Corp*, 189 Pa Super 47; 149 A 2d 498 (1959); *Rader v Campbell*, 134 W Va 485; 61 SE 2d 228 (1949). But see *Blanton v Womancare, Inc*, 38 Cal 3d 396; 696 P 2d 645; 212 Cal Rptr 151 (1985). Thus, **a third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. In such a situation, the client's remedy is to sue his attorney for professional malpractice. The third party may rely on the attorney's apparent authority unless he has reason to believe that the attorney has no authority to negotiate a settlement.**

Nelson, at 89-90 (emphasis supplied, footnotes omitted).

Although the *Nelson* case involved an attorney's representation about settlement, the holding should not be limited to simply an attorney's representation with respect to settlement. Regardless of the subject, the attorney's statement is binding on his client.

Numerous Michigan cases have followed the reasoning of *Nelson*. Many cases across the country stand for this nearly universal proposition. At least one Michigan Court has applied the reasoning of *Nelson* to bind a party to her attorney's statements, even if it was not a statement confirming a settlement. Attached hereto as Tumbleweed's

Exhibit "I" is the unpublished Michigan Court of Appeals Decision of *Davis v. Brite Site, Inc*, Docket No. 187412, decided September 20, 1996. In that case, the defendant's attorney (Zacharski) agreed to put the case into binding arbitration. The defendant argued that it did not agree to put the case into arbitration. The Court, once again, held that a party is bound by the statement of its attorney. "Thus, although Zacharski did not have defendant's express authority to bind defendant, he did have the apparent authority to do so. Therefore, defendant was bound by the arbitration agreement which Zacharski executed." *Davis*, at p 2 of Slip Opinion.

The relevant question is not what the plaintiffs believed or what the plaintiff's attorney believed. Rather, the issue is what a reasonable third party would believe when presented with a letter from the plaintiffs' attorney unequivocally stating that he was representing the plaintiffs. Thus, the question is not whether the attorney had the authority to make such a statement. Rather, the issue was whether the attorney appeared, to a third party, to have that apparent authority. Apparent authority arises when the attorney's statement would lead a reasonable third party to believe that the attorney is acting on behalf of the party.

On Page 14 of the Plaintiff's Brief, they cite the case of *Dalrymple v Nat'l Bank & Trust Co of Traverse City*, 615 F Supp 979, 983 (WD Mich 1985), in support of their argument that a client must reasonably believe that an attorney client relationship has been created. Again, that is not the relevant question here. Moreover, *Dalrymple* involved an issue of a conflict of interest of an attorney who formerly represented a party. Thus, there was a motion for disqualification. None of the case law cited by the plaintiff

concerns the real issue here, that is, whether the plaintiffs are bound by the representations of their attorney.

II. THE PLAINTIFFS CITE NO RELEVANT LAW IN RESPONSE TO DEFENDANT'S ARGUMENT THAT THE MEKLIR AFFIDAVIT SHOULD NOT BE CONSIDERED PURSUANT TO THE NO-CONTRADICTION RULE.

The plaintiff correctly states the law with respect to the no contradiction rule, that is, that an affidavit in response to a Motion for Summary Disposition can only be considered by the Court, if the affidavit is simply a clarification of a statement. Plaintiff suggests that the Meklir affidavit, therefore, was simply a "clarification" of the prior statement in his letter. Plaintiffs do not stop there. **Plaintiffs then state that defendant does not support its argument that the affidavit "constitutes anything other than a clarification and explanation of his letter to the Tumbleweed."** A simple review of the affidavit and the letter reveals that the affidavit is not a clarification, but rather, the affidavit is wholly inconsistent with the letter.

In the letter, Meklir states **"Please be advised that I represent Mr. David Sanders as a result of injuries he sustained while at the Highway Bar [Tumbleweed] which occurred on December 2, 2014."** Juxtaposed to his letter is the statement in his affidavit. In his affidavit, Meklir testifies that **"[a]t no time did I ever represent the Sanders regarding the personal injury claim that involved the assault on Mr. Sanders."** That does not constitute a "clarification." If that is not an inconsistent statement, it is difficult to discern what may constitute an inconsistent statement.

III. THE PLAINTIFFS INCORRECTLY ARGUE THAT, IN ADDITION TO THE DRAMSHOP COUNT PLEAD AGAINST TUMBLEWEED, THAT NEGLIGENT COUNTS WERE ALSO PLEAD AGAINST TUMBLEWEED.

On Page 3 of their Brief, the plaintiffs incorrectly state that the defendants also argue that the separate claims of negligence were improper and should be dismissed. Defendant Tumbleweed never made such an argument, since the plaintiffs never plead, nor could they, plead, a negligence cause of action against Tumbleweed. The fight took place outside of the co-defendant Chauncey's Pub. The plaintiffs have never argued that the Tumbleweed is liable on a premises liability or negligence claim. Tumbleweed attached the plaintiff's Complaint as **Exhibit "E"** to its Application for Leave to Appeal.

The plaintiffs filed an eight Count Complaint. They specifically stated which defendant each count was brought against. A summary of the Counts of the Plaintiff's Complaint are as follows:

- Count I – Assault (against Defendants Spohn and Pierce)
- Count II - Battery (against Defendants Spohn and Pierce)
- Count III - Dramshop Act Violation (against Defendant Tumbleweed Saloon, Inc)
- Count IV - Dramshop Act Violation (against Defendant Painter Investments, Inc)
- Count V - Negligent Supervision and Training of Employees (against Defendant Painter Investments, Inc)
- Count VI - Wilful and Wanton Misconduct (against Defendant Painter Investments, Inc)
- Count VII – Premises Liability (against Defendant Painter Investments, Inc)
- Count VIII – Loss of Consortium (against all Defendants)

As can be seen, the only counts against Defendant Tumbleweed Saloon, Inc., are Count III, for a "Dramshop Act Violation," and Count VIII, for "Loss of Consortium." Tumbleweed, therefore, never argued that any Count of the Complaint should be dismissed, other than Count III, since the plaintiff explicitly stated in the Complaint that it was asserting only Dramshop claims against the Tumbleweed. If plaintiffs' Dramshop Count was dismissed, then Count VIII for "Loss of Consortium," a derivative claim, would also, by operation of law, be dismissed. Accordingly, the plaintiffs' statement that the "defendants" (plural) argued that the negligence claims were improper and should be dismissed, is factually wrong. The only issue pertaining to defendant Tumbleweed is that which was plead, which is an alleged violation of the Dramshop Act.

CONCLUSION/RELIEF REQUESTED

Wherefore, Defendants-Appellant, Tumbleweed Saloon, Inc., respectfully requests that this Honorable Court grant its Application for Leave to Appeal or, in the alternative, to summarily reverse the decision of the Court of Appeals for the reasons stated in the Court of Appeals Dissenting Opinion.

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